

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HAROLD WARREN,)	
)	
Plaintiff)	
)	
v.)	Civil No. 01-293-P-C
)	
CHARLES C. COCHRANE, et al.,)	
)	
Defendants)	

**RECOMMENDED DECISION ON DEFENDANTS’
MOTIONS FOR SUMMARY JUDGMENT**

Defendants Charles C. Cochrane, Blethen Maine Newspapers, Inc. Pension Plan and Blethen Maine Newspapers, Inc. (collectively, “Blethen Defendants”) and defendant Wells Fargo Master Trust & Custody (“Wells Fargo”) move for summary judgment as to all claims against them in this action alleging violations of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C. § 1001, *et seq.* See generally Blethen Defendants’ Motion for Summary Judgment, etc. (“Blethen Defendants’ Motion”) (Docket No. 10); Defendant Well [sic] Fargo Bank Minnesota, N.A.’s Motion for Summary Judgment, etc. (“Wells Fargo’s Motion”) (Docket No. 13); Complaint (Docket No. 1). For the reasons that follow, I recommend that Wells Fargo’s motion for summary judgment be granted but that of the Blethen Defendants be denied.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the

outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Context

The parties’ statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following relevant to this recommended decision:¹

¹ I meld the statements of fact of the Blethen Defendants and Wells Fargo inasmuch as Wells Fargo incorporates by reference the Blethen Defendants’ statement, *see* Defendant Well [sic] Fargo Bank Minnesota, N.A.’s Statement of (continued on next page)

Plaintiff Harold Warren was born on June 18, 1933. Blethen Defendants' Statement of Undisputed Material Facts ("Blethen Defendants' SMF") (Docket No. 11) ¶ 1; Plaintiff's Statement of Undisputed Material Facts ("Plaintiff's Opposing SMF") (Docket No. 17) at 1. He became an employee of the Guy Gannett Publishing Company, later known as Guy Gannett Communications (either or both, "Gannett"), in 1964. *Id.* ¶ 2. At all relevant times he was a qualified and vested participant in the Guy Gannett Retirement Plan that became effective on January 1, 1984, as amended and restated ("GGRP84"). *Id.* ¶ 3.

Warren retired on September 1, 1988 at age 55, after twenty-four years of employment with Gannett. *Id.* ¶ 4. At the time of his retirement, he was employed in Gannett's Division 42 and was not a member of the Portland Typographical Union, Local 66, also known as PTU-66. *Id.* ¶ 5. He elected to retire early upon attaining age 55, an election permitted under the terms of the GGRP84. *Id.* ¶ 6. Under the terms of the GGRP84, Warren could choose to begin receiving his monthly pension benefit immediately or defer collecting it. *Id.* ¶ 7. He elected the deferred-payment option, which allowed him to receive a higher monthly benefit than he would have received if he had chosen the immediate-payment option. *Id.* ¶ 8. Prior to electing to defer his retirement benefit, Warren was told that he would receive approximately \$250 per month under the deferred-payment option. *Id.* ¶ 9.

The GGRP84 provided the Gannett Board of Directors ("Gannett Board") the authority to amend the plan through the following provision:

15.01 Right to Amend

The Employer reserves the right at any time or times to modify or amend the Plan by resolution of it's [sic] Board of Directors setting forth such

Undisputed Material Facts ("Wells Fargo's SMF") (Docket No. 14) ¶ 11, and Wells Fargo's additional facts do not bear on the Blethen Defendants' motion for summary judgment.

modification or amendment; provided, however, that (i) the Board may delegate such authority to the Committee with respect to a modification or amendment which is required to comply with the laws and regulations governing this plan or any modification or amendment which is administrative in nature, and (ii) no such modification or amendment shall be made which would:

- (a) increase the duties or liabilities of the Insurance Company or Trustee without its written consent;
- (b) divest a Participant of any interest hereunder that has accrued to him prior to the effective date of such amendment;
- (c) cause or permit any portion of the Fund to be converted to or become the property of the Employer prior to the satisfaction of all liabilities with respect to the Plan; or
- (d) cause any portion of the Fund to be used for purposes other than the exclusive benefit of the Participants or their beneficiaries;

unless such modification or amendment is necessary or appropriate to enable the Plan or Fund to qualify under Section 401 of the Internal Revenue Code, as amended from time to time, or under any corresponding section of the Internal Revenue Code as hereafter enacted, or to retain for the Plan or Fund such qualified status.

Id. ¶ 10.

After Warren's retirement, on September 25, 1990, the Gannett Board unanimously voted to authorize management to improve pension benefits for eligible retired employees under the GGRP84, effective January 1, 1991. *Id.* ¶ 11. As of January 1, 1991 the GGRP84 was amended to incorporate this Board-approved benefit increase. *Id.* ¶ 12. Warren became aware of the 1991 increase at or about the time it took effect in January 1991. *Id.* ¶ 13.

The plan ("GGRP92"), as amended and restated, contained the following provision related to the 1991 increase:

4.08 1991 RETIREE INCREASE FOR GANNETT PARTICIPANTS

Effective January 1, 1991, the monthly benefit payable to each Retired Gannett Participant who is in pay status as of December 31, 1990, except for an individual whose last employment covered by the Plan was as an Employee of Division 41, shall be increased by the product of:

- (a) 1%; and
- (b) the lesser of 12, and the number of complete calendar years which elapsed between the date the Retired Gannett Participant first became a Participant and January 1, 1990.

Id. ¶ 14.

Warren admits that the language of section 4.08 of the GGRP requires retirees to have been in pay status in order to receive the benefit of the 1991 increase. *Id.* ¶ 16.² He was not in pay status as of December 31, 1990 or January 1, 1991. *Id.* ¶ 17. He began receiving his monthly pension benefits on July 1, 1995. *Id.* ¶ 18. The amount of the monthly pension benefit he then received was \$250.53 – the amount Gannett had told him he would be getting prior to his election of the deferred-payment option at the time of his retirement. *Id.* ¶ 19. The amount of the monthly pension benefit he has received since July 1, 1995 has not changed. *Id.* ¶ 20.

Warren was aware at the time he received his first monthly pension benefit on July 1, 1995 that it did not include the 1991 increase to which he believed he was entitled. *Id.* ¶ 21. In July 1997, during a conversation with Bonnie Campbell, Gannett’s benefits coordinator, regarding a mistake in his health insurance, Warren mentioned that his monthly pension benefit did not include the 1991

² The Blethen Defendants’ further statement that “Warren admits that the Blethen Defendants have the right to amend the GGRP84,” Blethen Defendants’ SMF ¶ 15, is neither admitted nor fairly supported by the deposition excerpt cited, in which Warren testified that “I’m sure a company has got a right to change the plan,” Deposition of Harold Warren, attached to Blethen Defendants’ SMF, at 43-44. Nor, in any event, does the purported admission bear on whether any particular amendment was properly made.

increase despite his belief that he was entitled to it. *Id.* ¶ 22. This was the first time he raised the issue of his claimed entitlement to the 1991 increase with anyone at Gannett. *Id.* ¶ 23.

By letter from Campbell dated July 21, 1997 Gannett informed Warren that his request for an increase in benefits was denied because he was not in pay status as required by the terms of the GGRP92. *Id.* ¶ 24. By letter dated July 28, 1997 from Deborah Mahoney, Gannett's corporate benefits manager, Gannett reiterated to Warren that his request for an increase in his monthly pension benefit was being denied because he was not in pay status as required by the terms of the GGRP92. *Id.* ¶ 25.

In or about November 1998 Blethen Maine Newspapers, Inc. succeeded to and assumed certain of Gannett's responsibilities under the GGRP84 and GGRP92. *Id.* ¶ 26. The Blethen Maine Newspapers, Inc. Pension Plan is the successor defined benefit plan to the GGRP84 and GGRP92. *Id.* Warren made no further request with respect to his claimed entitlement to the 1991 increase until his attorney sent a letter to Janet Baer of Blethen on March 2, 1999 seeking the benefit of that increase on Warren's behalf. *Id.* ¶ 27.

Wells Fargo is the current trustee of the Blethen Maine Newspapers, Inc. Pension Plan. Wells Fargo's SMF ¶ 3; Plaintiff's Opposing SMF at 2. Under the plan, the Committee "shall be responsible for the determination of benefit rights; the instruction of the Trustee in the disbursement of benefits; and the performance of those Plan administrative functions specified in the Plan." *Id.* ¶ 4. Under the plan, the Trustee "shall be responsible for the custody and investment of the Plan assets, . . .; the disbursement of benefits as instructed by the Committee; and the purchase and sale of securities as instructed by an investment manager, if an investment manager has been appointed." *Id.* ¶ 5.

Under the plan, the trustee is not responsible for the determination of benefit rights, and the plan expressly provides: “Each Fiduciary’s responsibility is limited to the performance of those duties given to that Fiduciary by the Plan. . . . [N]o Fiduciary is responsible for the acts or omissions of any other Fiduciary.” *Id.* ¶ 6. Under the plan, “[t]he Committee shall direct the Trustee concerning all payments which are to be made out of the Fund pursuant to the Plan, and all terminations of such payments.” *Id.* ¶ 7. The Trust provides, in relevant part: “The Trustee shall be under no liability for any distribution made by it pursuant to the directions of the Retirement Board, and shall be under no duty to make inquiry as to whether any distribution directed by the Retirement Board is made pursuant to the provisions of the Plan.” Wells Fargo’s SMF ¶ 8; Seattle Times Multiple Pension Plan Trust (“Seattle Plan”), attached as Exh. B to Affidavit of Joel S. Levi (Docket No. 15), at 4.³

Warren’s requested benefits were denied by the Administrative Committee of the Blethen Maine Newspapers, Inc. Pension Plan. *Id.* ¶ 9. Wells Fargo was not responsible for the decision to deny Warren’s request for benefits. *Id.*

The Gannett Board that authorized the pension benefit upgrade on September 25, 1990 did not expressly limit, in writing or otherwise, the pension benefit upgrade to eligible retirees in a pay status as of December 31, 1990. Plaintiff’s Opposing SMF at 3; Blethen Defendants’ Reply to Plaintiff’s Statement of Undisputed Material Facts (“Blethen Defendants’ Reply SMF”) (Docket No. 19) ¶ 1.⁴ In addition, that board did not expressly authorize in writing the “in pay status” language

³ Warren attempts to deny this statement on the basis that the Seattle Plan did not apply to him at the time of his retirement. Plaintiff’s Opposing SMF at 2-3. However, he does not explain, nor is it self-evident, why the current trustee’s duties and liabilities should be determined with reference to documents existing at the time Warren retired.

⁴ The Blethen Defendants deny the materiality of this statement, *see* Blethen Defendants’ Reply SMF ¶ 1; however, it is indeed material for reasons discussed below.

set forth in paragraph 4.08 of GGRP92. Plaintiff's Opposing SMF at 3; [Minutes of] Special Meeting of the Board of Directors [held on September 25, 1990], attached to *id.*, at 4-5.⁵

III. Analysis

A. Blethen Defendants' Motion

In seeking summary judgment, the Blethen Defendants posit that (i) Warren's entitlement to the 1991 benefits increase is determined solely by reference to the language of the relevant plan, GGRP92, (ii) section 4.08 of that plan unambiguously provides that he is not eligible for the benefits in question, and (iii) inasmuch as the language of section 4.08 is unambiguous, Warren's extrinsic evidence (including that related to the Gannett Board's intent) is inadmissible to vary the terms of that plan. *See generally* Blethen Defendants' Motion; Blethen Defendants' Reply Memorandum in Support of Motion for Summary Judgment (Docket No. 18).

As Warren's opposition suggests, this argument misapprehends the nature of his claim. *See generally* Plaintiff's Opposition to the Motion for Summary Judgment of the Defendants, Charles C. Cochrane, Blethen Maine Newspapers, Inc. Pension Plan, Blethen Maine Newspapers, Inc., and Wells Fargo Bank Minnesota, N.A. ("Plaintiff's Opposition") (Docket No. 16). Warren alleges, in relevant part, that (i) the Gannett Board alone was authorized to make the amendment in question, (ii) there is no evidence that the board ever authorized exclusion of retirees in non-pay status from participation in the 1991 benefits increase, and (iii) accordingly, although section 4.08 unambiguously sets forth such an exclusion, that language is unauthorized and unenforceable. *See, e.g.,* Complaint ¶¶ 31-33, Plaintiff's Opposition at 2-3.

⁵ Warren's further qualifier, that the Gannett Board did not expressly authorize this language in writing "or otherwise," Plaintiff's Opposing SMF at 3, is not supported by the citations given. The Blethen Defendants deny the entire statement. Blethen Defendants' Reply SMF ¶ 2; Response of Blethen Defendants to Plaintiff's Request for Admissions, attached to Plaintiff's Opposing SMF, ¶ 2(M).

Although Warren fails to cite caselaw in support of this theory, *see generally* Plaintiff's Opposition, the concept that an ERISA plan may validly be amended only in conformance with prescribed plan procedures is not novel, *see, e.g., Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 85 (1995) ("ERISA . . . follows standard trust law principles in dictating only that whatever level of specificity a company ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level."); *Dall v. Chinnet Co.*, 33 F. Supp.2d 26, 42 (D. Me. 1998), *aff'd*, 201 F.3d 426 (1st Cir. 1999) ("informal or unauthorized modification of pension plans is impermissible under ERISA") (citation and internal quotation marks omitted), and its contours are adequately sketched in Warren's complaint and brief.

Inasmuch as Warren's claim for increased benefits is not predicated on existing plan language, but rather on the existence within the plan of purportedly unauthorized language that he requests the court strike, the "extrinsic evidence" bar on which the Blethen Defendants rely is inapposite. *See, e.g., Curtiss-Wright*, 514 U.S. at 85 ("On remand, the Court of Appeals will have to decide the question that has always been at the heart of this case: whether Curtiss-Wright's valid amendment procedure – amendment 'by the Company' – was complied with in this case. The answer will depend on a fact-intensive inquiry, under applicable corporate law principles, into what persons or committees within Curtiss-Wright possessed plan amendment authority, either by express delegation or impliedly, and whether those persons or committees actually approved the new plan provision contained in the revised SPD.").

Nor do the Blethen Defendants demonstrate entitlement to summary judgment on the merits of Warren's invalid-amendment claim. Warren adduces sufficient evidence to raise a genuine issue of material fact whether the Gannett Board authorized the "in-pay status" language in issue. Moreover, although this court has held that a plaintiff must demonstrate not only a procedural

violation but also harm or prejudice flowing therefrom to be entitled to equitable relief pursuant to ERISA, *see, e.g., Chinet*, 33 F. Supp.2d at 45-47, it is clear that but for the allegedly unauthorized “in-pay status” language incorporated into section 4.08 of the GGRP92, Warren would have been eligible for the increased benefits in issue.

B. Wells Fargo’s Motion

Wells Fargo stands on different footing than the Blethen Defendants. Although Wells Fargo incorporates by reference their argument, it also contends alternatively that it cannot be held liable for denial of Warren’s benefits inasmuch as it played no part in that decision and is not by the terms of the plan responsible either for the determination of benefit rights or for the acts or omissions of any other fiduciary. Wells Fargo’s Motion at 3-4. Warren admits all of these critical facts, entitling Wells Fargo to summary judgment as to all claims against it.

IV. Conclusion

For the foregoing reasons, I recommend that the motion of Wells Fargo for summary judgment be **GRANTED** and that of the Blethen Defendants be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 4th day of September, 2002.

David M. Cohen
United States Magistrate Judge

TRLIST STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-293

WARREN v. COCHRANE, et al
Assigned to: JUDGE GENE CARTER
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Filed: 12/12/01

Nature of Suit: 890
Jurisdiction: Federal Question

Cause: 28:1001 E.R.I.S.A.

HAROLD WARREN
 plaintiff

FERNAND A. MARTINEAU, ESQ.
[COR LD NTC]
278 CAPISIC STREET
PORTLAND, ME 04102-1706
207/773-6105

v.

CHARLES C COCHRANE, in his
capacity as Plan Administrator
of the Blethen Maine
Newspapers, Inc. Pension Plan
 defendant

ROY T. PIERCE, ESQ.
[COR LD NTC]
PRETI, FLAHERTY, BELIVEAU,
PACHIOS & HALEY, LLC
ONE CITY CENTER
PO BOX 9546
PORTLAND, ME 04101-9546
791-3000

BLETHEN PENSION PLAN
 defendant

ROY T. PIERCE, ESQ.
(See above)
[COR LD NTC]

WELLS FARGO MASTER
 defendant

SETH W. BREWSTER, ESQ.
[COR LD NTC]
VERRILL & DANA
1 PORTLAND SQUARE
P.O. BOX 586
PORTLAND, ME 04112
(207) 774-4000

BLETHEN MAINE NEWSPAPERS
INCORPORATED
 defendant

ROY T. PIERCE, ESQ.
(See above)
[COR LD NTC]